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Supreme Court of the United States

October Term, 1961

No. 179

SAVERIO NASTA, PHILIP ROMANO, DANIEL J. WISNIEWSKY, ALFRED NECKLEN, WILLIAM J. SCHEURER, JAMES SUGRUE, FELIX MEEHAN, CORNELIUS BOYLE, FRANK RAPCZNSKI and WILLIAM NEELY,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JACOB RASSNER,
Proctor for Petitioners.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Opinion Below	2
Jurisdiction	2
Reasons for Granting the Writ	2
Statement of Facts	3
POINT I—The shipowner was negligent in failing to warn petitioners or their employer of a dangerous condition that would be created in the holds of the vessel during the work to be performed	5
The decision by the Court below is contrary to the holdings by the United States Supreme Court in the case of *United N. Y. & N. J. Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U. S. 613, 79 S. Ct. 517, and of the Court of Appeals for the State of New York in the case of *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314	5
POINT II—Shipowner was negligent in failing to provide petitioners with a safe place wherein to work	6
Conclusion	9
Appendix:	
Opinion of United States Court of Appeals for the Second Circuit	11
Judgment	13

Case Cited

	PAGE
Bartholomew v. Universe Tankships, Inc., 263 F. 2d 437, cert. denied, 359 U. S. 1000, 79 S. Ct. 1138....	2
Blue Ridge Rural Electric Cooperative v. Byrd, 264 F. 2d 689, 693.....	8, 9
McAllister v. Magnolia Petroleum Company, 357 U. S. 221, 78 S. Ct. 1201, 1204.....	2
McFall v. Compagnie Maritime Belge, 304 N. Y. 314, 324	5, 6
Nasta v. U. S., 288 F. 2d 186 (1961).....	2, 3
United N. Y. & N. J. Sandy Hook Pilots Ass'n v. Halecki, 358 U. S. 613, 79 S. Ct. 517.....	5, 7
United N. Y. & N. J. Sandy Hook Pilots Ass'n v. Halecki, 282 F. 2d 137, 141.....	8
Vanderlinden v. Lorentzen, et al., 139 F. 2d 995....	7
West v. U. S., 361 U. S. 118, 80 S. Ct. 189, 4 L. Ed. 161	2, 3

Statutes Cited

28 U. S. C. 1254 (1).....	2

Supreme Court of the United States

October Term, 1960

No.

SAVERIO NASTA, PHILIP ROMANO, DANIEL J. WISNIEWSKY, ALFRED NECKLEN, WILLIAM J. SCHEURER, JAMES SUGRUE, FELIX MEEHAN, CORNELIUS BOYLE, FRANK RAPCZNSKI and WILLIAM NEELY,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on March 27, 1961.

Questions Presented

1. Is a shipowner immune from liability for injury suffered by ten ship employees, aboard its ship which was being reactivated, in the face of a finding by Trial Judge, John C. Knox, that exposure of these men to the prevailing conditions was "woefully negligent"?

2. Is the question of control of a vessel the determining factor in establishing liability for the consequences of a concededly unsafe place to work?

3. Is the distinction between unseaworthiness and negligence a determining factor in establishing liability for a seaboard accident?

4. Is an inactive ship, on navigable waters, governed by federal or state law?

Opinion Below

The opinion below is reported at 288 F. 2d 186 (1961).

Jurisdiction

The judgment of the Court of Appeals was entered on March 27, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Reasons for Granting the Writ

The decision by the Court below constitutes a radical departure from well established and universally accepted law that the owner of a vessel is under an affirmative and non-delegable duty to provide seaboard employees with a reasonably safe place wherein to work.

The Court below has interpreted the holding in the case of *West* v. *United States,* 361 U. S. 118, 80 S. Ct. 189, in a manner in nowise justified by the decision therein.

The Court below has rendered ineffectual the holding by this Honorable Court in the case of *McAllister* v. *Magnolia Petroleum Company,* 357 U. S. 221, 78 S. Ct. 1201, and the holding by the Court below in the case of *Bartholomew* v. *Universe Tankships, Inc.,* 263 F. 2d 437, cert. denied, 359 U. S. 1000, 79 S. Ct. 1138. These cases seem to support the proposition that rather than draw a line of demarcation between unseaworthiness and negligence, that both be considered together, as stated by this Honorable Court at page 1204 in *McAllister, supra*:

> "• • • in order to make full utilization of his remedies for personal injury, and since that can be accomplished only in a single proceeding • • •"

Statement of Facts

District Judge Knox factually found petitioners to have been injured through acts which he called "woefully negligent", but then erroneously, held the Government immune from liability. This erroneous holding was affirmed by the Court below on the authority of *West* v. *United States*, 361 U. S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 (*Nasta, et al.* v. *United States of America*, 288 F. 2d 186).

The action was brought in Admiralty by ten (10) persons, former employees of Constable Hook Shipyard Inc., of Bayonne, New Jersey, to recover damages from the United States of America, for injuries or illness (contact dermatitis) sustained during June and July 1955, while doing work in the holds of a vessel owned by the United States of America, the "JOHN MARSHALL".

In 1942 the "JOHN MARSHALL" was deactivated and placed in the James River Reserve (mothball) Fleet.

In April 1952, the ship was transferred to the Hudson River Reserve (mothball) Fleet.

During her deactivation, the vessel's standard rigging and booms were lowered into cradles; the cargo blocks were removed and stowed in the 'tween decks; the boilers were drained, the main engine was inoperative, and the electrical equipment was covered with a preservative. The "JOHN MARSHALL" was, in fact, a "dead ship" and incapable of navigation.

On May 22, 1955, the ship was towed to Brewer's Dry Dock on Staten Island, New York, where she was drydocked and surveyed.

This work was done under the direction and supervision of Mr. John B. Carlson, a marine engineer, licensed for steam and motor vessels of any tonnage. For upwards of

ten (10) years he has been employed by the United States Department of Commerce as a marine surveyor.

When Mr. Carlson completed his survey, he specified certain work to be performed aboard the vessel. Constable Hook Shipyard, Inc., the petitioners' employer, was the successful bidder on the work to be done.

On June 27, 1955, the "JOHN MARSHALL" was towed from Brewer's Dry Dock to the plant of the Constable Hook Shipyard, Inc.

It was during the next month that the petitioners were employed aboard the vessel and suffered the injuries or illness complained of.

Judge John C. Knox, in his opinion, found that the proximate cause of the injuries or illness sustained by the petitioners was as follows (11a):

> "In this respect, the shipyard, in my opinion, was woefully negligent. Within the holds of the ship, in late June of 1955, when the weather was extremely hot, there was no ventilation, except from open hatchways, and three or more men were 'burning' steel. At least one man was 'chipping' with a pneumatic air hose. The burning of steel with acetylene torches would, I believe, be productive of an abrasive residue, or ash, which, with the dust created by the use of a pneumatic hose, would sear the skin of most anyone. This might, I think, have been avoided by the use of 'blowers', which would have generated currents of air within the holds, and carried away the irritants that have tormented libelants. The holds of the ship, under conditions that existed, must have been little short of an inferno."

POINT I

The shipowner was negligent in failing to warn petitioners or their employer of a dangerous condition that would be created in the holds of the vessel during the work to be performed.

The decision by the Court below is contrary to the holdings by the United States Supreme Court in the case of *United N. Y. & N. J. Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U. S. 613, 79 S. Ct. 517, and of the Court of Appeals for the State of New York in the case of *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314.

The Honorable John C. Knox, in his opinion below, stated (11a):

> "The Government, of course, if aware of any hidden danger, or latent defect in the vessel, was under an obligation to call the same to the attention of the shipyard."

The Court below was in error in sustaining the learned Trial Court.

The learned Trial Court below was in error in considering the question of whether or not the Government was aware of the "hidden danger or latent defect in the vessel".

The vessel having been under the exclusive control of the Government for many years, it is charged with knowledge of its condition and the dangers to be encountered when engaged in the very work which it had ordered and which was performed under circumstances anticipated by, and known to, the Government.

In the case of *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, at page 324, the Court of Appeals of the State of New York stated:

> "Under the maritime law a longshoreman who is employed by an independent contractor engaged by the owner to load its ship, occupies the status of

> an invitee aboard the vessel. As such he is entitled to a reasonably safe place to work. The duty of exercising reasonable diligence to provide such a place and warn the longshoremen of hidden dangers devolves upon the owner of the ship. For a breach of that duty liability follows. Fodera v. Booth Amer. Shipping Corp., D. C., 66 F. Supp. 319, 320, affirmed, 2 Cir. 159 F. 2d 795; The S.S. Anderson, D. C., 37 F. Supp. 695; The Dalhem, D. C., 41 F. Supp. 718, 720; Altamura v. United States, D. C., 78 F. Supp. 531, 532."

Judge Knox, however, concluded that "* * * no such hazard existed." This is error in view of his finding that the operation, as performed, was "productive of an abrasive residue, or ash, which, with the dust created by the use of a pneumatic hose, would sear the skin of most anyone." It is immaterial that the condition was not dangerous until it was put into operation by human intervention.

The shipowner, through its agent, Carlson, and others knew that this condition would occur, and in addition, in the exercise of reasonable care and prudence, should have known that it would occur. The shipowner was negligent in failing to warn the shipyard of this danger.

POINT II

Shipowner was negligent in failing to provide petitioners with a safe place wherein to work.

The failure to provide a safe place to work, as a basis of negligence is so well established that we will limit this brief to what we believe are the latest leading authorities.

In *McFall* v. *Compagnie Maritime Belge, supra,* following the paragraph quoted under Point I, *supra,* the Court stated:

> "That duty is nondelegable and the fact that there is a concurrent duty imposed upon the longshore-

> man's employer to furnish him with a safe place to work does not alter the owner's liability. Anderson v. Lorentzen, 2 Cir., 160 F. 2d 173; Vanderlinden v. Lorentzen, 2 Cir., 139 F. 2d 995; Fodera v. Booth Amer. Shipping Corp., D. C., 66 F. Supp. 319, affirmed 2 Cir., 159 F. 2d 795, supra; Porello v. United States, 2 Cir., 153 F. 2d 605, 608, reversed in part and affirmed in part sub nom. American Stevedores v. Porello, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011."

Judge Knox found:

> "This might, I think, have been avoided by the use of 'blowers' which would have generated currents of air within the holds and carried away the irritants that have tormented libelants." (11a)

The negligence charged to petitioners' employer by Judge Knox applies with equal force to shipowner. The shipowner was under a duty to install blowers, or make certain such were installed.

The Government cannot relieve itself of liability simply by turning the vessel over to Constable Hook Shipyard, Inc., an independent contractor. *Vanderlinden* v. *Lorentzen, et al.,* 139 F. 2d 995.

The shipowner knew, or should have known that the operation would create an unsafe place wherein to work and should have done something to rectify the situation, and is charged with liability for the consequential dangers and its failure to provide petitioners with appropriate safety measures, or at least warning.

The situation is identical to the question considered by the United States Supreme Court in the case of *United N. Y. & N. J. Sandy Hook Pilots Ass'n* v. *Halecki, supra,* wherein at page 520, the Supreme Court stated:

> "The defendants owed a duty of exercising reasonable care for the safety of the decedent. They were charged with knowledge that carbon tetrachloride

> was to be used in the confined spaces of the engine room. It was for the triers of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its use."

After the *Halecki* case was tried again in the District Court, it again came before the Circuit Court and is reported at 282 F. 2d 137. At page 141 of that opinion, Judge Moore states:

> "Where a dangerous operation is to be undertaken the law suggests that reasonable care be exercised to ascertain how the work is to be carried on (251 F. 2d 708, 711). This does not mean that the ship owner must undertake the direction of the actual operation. The jury might find that the owner had done everything possible to assure safety. On the other hand, the owner knew the capacity of its regular engine room ventilating equipment and its adequacies or inadequacies to carry off heavy and dangerous fumes. A jury could find that assurance by the subcontractor that its own additional portable ventilators and gas masks were sufficient to prevent injury was reasonable care or it might equally conclude that the owner should have checked the equipment brought on board at least as to capacity and location for ventilating purposes."

The United States Court of Appeals for the 4th Circuit, in the case of *Blue Ridge Rural Electric Cooperative* v. *Byrd*, 264 F. 2d 689, stated at page 693:

> "It is generally held that an owner is liable for injuries incurred during the performance of work by an independent contractor if the work is of such character that injuries may be expected however carefully the work is performed; and in other decisions the liability of the owner has been held to include injuries that might be expected unless precautions were taken to prevent them. See the annotations in 23 A. L. R. 1016-1081 and 1084-1135, also, International Harvester Co. v. Sartain, 32 Tenn. App. 425, 222 S. W. 2d 854; Fiquett v. Wade Elec-

tric Light & Power Co., 206 Ala. 630, 91 So. 357; Person v. Cauldwell-Wingate Co., 2 Cir., 176 F. 2d 237; Harper & James, Law of Torts, Vol. 2, § 26.11 at pages 1408-1410; Prosser on Torts, § 64; Restatement of the Law of Torts, §§ 413, 416, 423; 27 Am. Jur., Independent Contractor, §§ 38, 39; 57 C. J. S. Master and Servant, § 590."

Reversed on other grounds by the Supreme Court, 356 U. S. 525, 78 S. Ct. 893.

CONCLUSION

It is respectfully submitted that an expression by the Supreme Court of the United States as to these disturbing conflicts as to the meaning of existing law, would be most beneficial to all persons concerned with the subject of duties and rights of shipowners and shipboard employees, and is of such general interest as to merit review by this Honorable Court.

Respectfully submitted,

JACOB RASSNER,
Proctor for Petitioners.

APPENDIX

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 260, Docket 26136

SAVERIO NASTA, PHILIP ROMANO, DANIEL J. WISNIEWSKY, ALFRED NECKLEN, WILLIAM J. SCHEURER, JAMES SUGRUE, FELIX MEEHAN, CORNELIUS BOYLE, FRANK RAPZCNSKI and WILLIAM NEELY,

Appellants,

v

UNITED STATES OF AMERICA,

Appellee.

Argued Feb. 17, 1961

Decided March 27, 1961

Before:

CLARK, SMITH and HAND,
Circuit Judges.

HAND, Circuit Judge:

The ten libellants filed a libel to recover for injuries to the skin and eyes suffered by them while at work on a ship of the United States, withdrawn from active service and in the possession of a contractor, to be conditioned for possible future service. Judge Knox tried the case, and dismissed the libel in an opinion, reported in 181 F. Supp. 906, which sets forth the facts at length. The libel contained two claims: (1) that the United States in delivering the

ship to the contractor's employees implied that she was seaworthy; that is, safe for work to be done; and (2) that it owed to the libellants, as "invited persons," or "business guests," a duty to furnish them with a reasonably safe place to work. Both in the District Court and on appeal the first claim has been withdrawn, and there remains for our consideration only the respondent's failure to conform to the law of New Jersey where the ship was at the time of the injuries. Judge Knox stated the facts in detail, and the appellants do not suggest that his statement was in any respect either inaccurate or inadequate. We may therefore proceed at once to a discussion of the validity of the second claim.

It appears to us that the situation at bar was like that decided in West v. United States, 361 U. S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161. Had it appeared that the substance, whatever it was, that caused the noxious fumes to fill the hold, had been put on the ship before she was delivered to the contractor, a question might arise whether the owner was not liable for failure to tell him what precautions should have been taken to provide against the dangers incident to the proposed repairs. However, we know nothing about what these dangers were, or indeed about what the substance was that produced the fumes. To hold that the owner had impliedly warranted to those, who worked upon her, that her condition was such as made it safe for them to do so, would have been equivalent to implying a warranty of seaworthiness *pro tanto*. The libellants were under a greater burden than only to show that they were injured while at work aboard, and that is really all that they did show.

Decree affirmed.

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Ad. 188-351

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of March one thousand nine hundred and sixty-one.

Present:

HON. LEARNED HAND,
HON. CHARLES E. CLARK,
HON. J. JOSEPH SMITH,
Circuit Judges.

—o—

SAVERIO NASTA, *et al.*,
Libelants-Appellants,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

—o—

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

A true copy.

A. DANIEL FUSARO,
Clerk.

S.
JUL 27 1961
JAMES R. BROWNING, Clerk

No. 179

In the Supreme Court of the United States

OCTOBER TERM, 1961

SAVERIO NASTA ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, Jr.,
Assistant Attorney General,
ALAN S. ROSENTHAL,
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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	6

CITATIONS

Cases:

Graver Tank & Mfg. Co., Inc. v. *Linde Air Products Co.*, 336 U.S. 271 — 4

Great Atlantic & Pacific Tea Co. v. *Supermarket Equipment Corp.*, 340 U.S. 147 — 4

Latus v. *United States*, 277 F. 2d 264, certiorari denied, 364 U.S. 827 — 5

Noel v. *Isbrandtsen*, 287 F. 2d 783, certiorari denied, June 19, 1961 — 5

The Germanic, 196 U.S. 589 — 4

United Pilots Association v. *Halecki*, 358 U.S. 613 — 6

West v. *United States*, 361 U.S. 118 — 4, 5, 6

Statute:

Suits in Admiralty Act, 46 U.S.C. 741, *et seq.* — 3

602343—61

QUESTION PRESENTED

Whether the courts below erred in finding that petitioners' injury was not occasioned by negligence on the part of the United States.

STATEMENT

The basic facts were found by the district court (181 F. Supp. 906, 906–910) and are not in dispute.

The S.S. *John Marshall* was a United States-owned Liberty vessel which in 1946 had been deactivated and placed in the "moth ball" fleet in the James River. The deactivation required heavy work, which included lowering the vessel's standing rigging into cradles, removing and stowing cargo blocks, draining boilers and pipes, rendering the main engine inoperative, and covering electrical equipment with preservatives. After its deactivation, the vessel was a "dead ship" incapable of navigation. 181 F. Supp. 906–907.

In April 1952, the *John Marshall* was transferred to the reserve (moth ball) fleet of the Hudson River. At that time 819 man-hours of labor were spent upon her in rust removal, sweeping, storage of tank tops, and other operations, but no metal preservatives of any kind were applied. None of the workers suffered any ill effects as a result of his presence on the vessel. 181 F. Supp. at 907.

On May 22, 1955, the vessel was towed to a drydock on Staten Island, where she was surveyed by a marine surveyor who found her holds exceptionally clean. From June 9 to June 24, 1955, a speed measuring device that extends through her hull was installed; this required burning and welding some of the metal portions of the vessel. None of the 20 or more work-

ers involved suffered any injury or discomfort from his work upon the ship. 181 F. Supp. at 907.

Constable Hook Shipyard, Inc., was the successful bidder on additional work to be performed upon the *John Marshall*. On June 27, 1955, the vessel was towed to the Constable Hook shipyard, where she was placed in the sole custody and control of Constable Hook. The work in the holds required burning and welding metal with acetylene torches, and "chipping" metal with a pneumatic hose. During the course of the work, the temperature was sometimes "well up in the 90's," and greyish powder or smoke was present in the holds. 181 F. Supp. at 907, 909.

As a result of these conditions the 10 petitioners, employees of Constable Hook, suffered a skin irritation. Apparently, similar irritation was not experienced by the remaining 15 or 20 employees aboard the vessel. The degree of skin irritation was minor for some of the petitioners, and substantial for others. The differences in severity were due to differing skin sensitivity. 181 F. Supp. at 908–910.

Petitioners brought this action under the Suits in Admiralty Act (46 U.S.C. 741, *et seq.*) against the United States, as owner of the *John Marshall,* for breach of the warranty of seaworthiness and for negligence in failing to provide a safe place to work. In the course of the trial, petitioners abandoned the unseaworthiness count and rested their case solely on negligence. The grey powder was never subjected to chemical or medical analysis, and no definite proof of the cause of the skin irritations was offered in evidence. 181 F. Supp. at 906, 910.

The district court expressed the opinion that petitioners' employer, Constable Hook shipyard, was "woefully negligent" in proceeding with the work after learning of petitioners' skin troubles, while failing to provide "blowers" which would carry away the abrasive ash and dust caused by the use of acetylene torches and pneumatic hose. The court, however, found that no latent defects or hidden dangers existed on the vessel when it was transferred to Constable Hook and that there had been no negligence on the part of the United States. It therefore dismissed the libel against the United States. 181 F. Supp. at 910.

The court of appeals, in an opinion by Judge Learned Hand, affirmed. The court noted that the situation in this case was similar to that in *West* v. *United States,* 361 U.S. 118, where the Court denied recovery against the United States. The court further held that there was an absence of proof as to what substance produced the skin irritations and concluded that petitioners (Pet. App. 12):

> * * * were under a greater burden than only to show that they were injured while at work aboard, and that is really all that they did show.

ARGUMENT

This Court does not "review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.,* 336 U.S. 271, 275; see, *e.g., Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.,* 340 U.S. 147; *The Germanic,* 196 U.S. 589. The courts below found that

the vessel contained no latent or hidden defects when transferred to the Constable Hook shipyard. Moreover, they found no basis in the record for a determination that the United States knew or should have known that a dangerous condition would arise in the careful performance of the work by the independent contractor. In short, the courts below found that there was no negligence on the part of the government; the only negligence was that of the contractor. These determinations are fully supported by the record.

The shipowner is not liable, in the absence of its own negligence or breach of the warranty of seaworthiness,[1] for injuries resulting from unsafe conditions caused by the work of an independent contractor making repairs upon the vessel. *West* v. *United States,* 361 U.S. 118, 122–123; *Noel* v. *Isbrandtsen,* 287 F. 2d 783 (C.A. 4), certiorari denied,

[1] Petitioners abandoned their claim for breach of the warranty of seaworthiness in both lower courts (181 F. Supp. 906; Pet. App. 11–12). In any event the warranty of seaworthiness has no application to the *John Marshall*, which was a dead ship of the moth ball fleet out of navigation undergoing repairs. *West* v. *United States*, 361 U.S. 118; *Latus* v. *United States*, 277 F. 2d 264 (C.A. 2), certiorari denied, 364 U.S. 827; *Noel* v. *Isbrandtsen*, 287 F. 2d 783 (C.A. 4), certiorari denied, June 19, 1961.

June 19, 1961.[1] Thus, the courts below were clearly correct in denying petitioners' claim and there is no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ALAN S. ROSENTHAL,
DAVID L. ROSE,
Attorneys.

JULY 1961.

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[1] *United Pilots Association* v. *Halecki*, 358 U.S. 613, relied upon by petitioners (Pet. 7–8), is not in point. There the jury found in favor of the libellant, and this Court, while reversing on the ground that the doctrine of unseaworthiness did not apply, remanded for a new trial on the question of the shipowner's negligence. On remand, the Second Circuit concluded that the shipowner might have been negligent in directing the use of a dangerous gas (carbon tetrochloride) in confined quarters without adequate ventilation, distinguishing *West* on the ground that in *West* the shipowner did not direct the use of a dangerous method of accomplishing the work. 282 F. 2d 137. This case is like *West* (as the Second Circuit noted below) and unlike *Halecki*, because the government did not direct the use of a dangerous method.

U. S. GOVERNMENT PRINTING OFFICE: 1961